

**allIN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

JOHN DOMEK,	:	
	:	
	:	
v.	:	Civil No. CCB-07-1469
	:	
ED SCHAFER,	:	
Secretary,	:	
United States Department of Agriculture	:	

**MEMORANDUM**

Plaintiff John Domek (“Dr. Domek”) has sued Ed Schafer, United States Secretary of Agriculture,<sup>1</sup> for violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2005). The claims stem from Dr. Domek’s removal from his position with the Agricultural Research Service (“ARS”). The government has moved for summary judgment. For the reasons articulated below, the government’s motion will be granted.

**BACKGROUND**

Dr. Domek began his employment with the United States Department of Agriculture (“USDA” or “the agency”) as a post-doctoral Research Entomologist in 1990. He held various positions in the Molecular Plant Pathology Lab and Insect Biocontrol Lab from 1994-2005; during these years, he received numerous awards and certificates of merit. In approximately February 2005, Dr. Domek requested to be transferred to work under Dr. Robert Harrison in the

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<sup>1</sup>This suit originally named Mike JoHanns in his official capacity as United States Secretary of Agriculture. Mr. JoHanns resigned his Cabinet post in 2007; the current Agriculture Secretary is Ed Schafer. Pursuant to Fed. R. Civ. P. 25(d)(1), Secretary Schafer replaces Mr. JoHanns as the defendant in this action, and the caption has been changed accordingly.

Insect Biocontrol Lab; he began work as a Molecular Biologist in March 2005. His job duties entailed planning and conducting research “in support of long-term research objectives to determine the molecular factors controlling baculovirus host range and virulence, with an emphasis on identifying viral host range/virulence genes.” (Def’s Mot. Summ. J., Report of Investigation [hereinafter “ROI”] 109.) The Molecular Biologist “is assigned an entire experiment, and therefore must plan and carry out advance preparation, the experimental protocol and the analysis of results.” (ROI 112.)

On September 30, 2005, Dr. Domek received a performance evaluation and a summary rating of “Unacceptable.” (ROI 121.) The evaluation was signed by Dr. Harrison, Dr. Domek’s immediate supervisor, and Dr. Matthew Greenstone, the Research Leader. The document specified that Dr. Domek had failed to meet expectations with respect to Performance Standards No. 1 (Planning and Preparation of Assigned Projects and Time Management) and No. 2 (Implementation of Assigned Projects). (*Id.*) Dr. Domek was placed on a Performance Improvement Plan (“PIP”) designed to “provide [Dr. Domek] with an opportunity to demonstrate ‘Fully Successful’ performance in C[ritical] E[lement] 1 and C[ritical] E[lement] 2.” (ROI 122-26.) The PIP was to begin upon Dr. Domek’s receipt of the plan and conclude on January 5, 2006.

The plan listed Dr. Domek’s shortcomings in Critical Element 1 as having “failed to maintain knowledge of methodologies of molecular biology and virology sufficient to plan and complete experiments for the creation of recombinant viruses Acodve56-lacZEGFP, Aclef7-lacZEGFP, and Aclef12-lacZEGFP,” and having “failed to complete experiments involved in the construction of these viruses in a manner that efficiently utilizes time and resources.” (ROI

123.) As to Critical Element 2, the PIP stated that Dr. Domek “failed to correctly employ the molecular biological techniques needed to achieve the construction of [the] recombinant viruses,” “failed to detect and solve problems with the procedures for assembly of transfer vector plasmids necessary for construction of the above viruses in a time-efficient manner,” and “failed to correctly evaluate the adequacy of results of plasmid construction procedure involved in making the transfer vectors.” (*Id.*) The plan set out the requirements for Dr. Domek to meet expectations for Critical Elements 1 and 2, including “adopt[ing] an active, aggressive stance towards acquiring and incorporating the molecular biology and virology knowledge you need,” and completing the necessary steps toward creation of the specified recombinant viruses. (ROI 124.)

To assist Dr. Domek with PIP completion, Dr. Harrison was to prepare weekly worksheets detailing the tasks to be accomplished. Dr. Harrison also was to meet with Dr. Domek on a weekly basis to “provide advice, guidance and specific suggestions” and to “answer any questions [Dr. Domek] may have regarding [his] assignments, [and] performance.” (*Id.*) The PIP specifically notes that “none of the performance elements described in [Dr. Domek’s] performance plan are above [Domek’s] level of expertise and training and [he has] the necessary resources available.” (ROI 125.)

The PIP period, originally set to end on January 5, 2006, was extended until March 31, 2006. Dr. Harrison claims that he was told the PIP period was extended because Human Resources was concerned it would look bad to have Dr. Domek’s dismissal come so soon after a “Superior” performance rating. (ROI 87-88.) The official notice of extension states that the plan was extended to give Dr. Domek the opportunity to take an additional class at NIH. (ROI

127.) On January 6, 2006, Dr. Domek met with Dr. Greenstone to discuss the PIP. During that meeting, Dr. Domek told Dr. Greenstone that he took antidepressants, and Dr. Greenstone suggested that Dr. Domek consult a psychiatrist because antidepressants can have side effects. (ROI 80-81.)

On March 24, 2006 - one week before the extended PIP period was to conclude - Dr. Harrison reminded Dr. Domek that the period would soon close and that Dr. Domek should turn in the cloning plans discussed in the requirement. (*See* ROI 124-25.) Dr. Domek replied that he did not know what Dr. Harrison was talking about. The plan that Dr. Domek ultimately submitted to Dr. Harrison appeared to Dr. Harrison to lack important details and to be copied from a prior publication. On April 21, 2006, Dr. Domek received an “Unacceptable” performance rating on Performance Elements 1 and 2. Meanwhile, Dr. Domek contacted Molly Hamilton (“Ms. Hamilton”), a Human Resources representative, to complain about his treatment by Dr. Harrison. He told Ms. Hamilton that Dr. Harrison was not friendly, that he and Dr. Harrison were mismatched, that Dr. Harrison was uncommunicative, and that Dr. Domek was dealing with stress from his daughter’s medical problems. (ROI 249.)

Dr. Domek received a notice of proposed removal in August 2006. (ROI 197-202.) In response, he met with Dr. Wanda Collins (“Dr. Collins”), Director of the Plant Sciences Institute, and informed her that he had been diagnosed with depression in 1992 and had recently experienced a breakdown in medical care. Dr. Domek requested a “light duty” assignment and that he be transferred to a different supervisor. He later submitted his medical records to the agency, including a note dated September 1, 2006 from Dr. John Parkhurst stating that Dr. Domek experienced “cognitive slowing from his depression, which results in memory

impairment, inability to focus, difficulty in concentration, and a failure to attend to important details. He is unable to read anything of any length and retain the information.” (ROI 210.) USDA’s Medical Officer, after reviewing Dr. Domek’s medical records, reported that Dr. Domek’s prognosis was “very guarded and there is no expected date for his recovery since his conditions are chronic.” (ROI 236.)

Dr. Collins consulted the Vacancy List for the Plant Sciences Institute, but found there were no open positions that would have allowed Dr. Domek to transfer to a different supervisor, nor were there any jobs for which he was qualified. (ROI 75.) Dr. Collins stated that no positions were open that would have allowed Dr. Domek to transfer to a lower grade level, and attributes this to the fact that the Beltsville office had begun a substantial downsizing process. (*Id.*)

Dr. Domek’s termination was effective November 5, 2006. He filed a formal discrimination complaint with the agency on December 14, 2006, which was denied by the USDA on July 27, 2007. In the action before this court, Dr. Domek has sued the agency for violations of the Rehabilitation Act, including the failure to provide him with reasonable accommodation, wrongful termination, and retaliation. In November 2007, the agency moved for summary judgment, claiming that Dr. Domek was not “otherwise qualified” for his position of molecular biologist, that he cannot show any causal connection between his termination and his disability, that the agency was not obligated to accommodate Dr. Domek’s disability by transferring him to a “light duty” position, and that the agency could not have retaliated against Dr. Domek’s protected activity because that activity occurred after removal proceedings were

already underway.<sup>2</sup>

## ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Supreme Court has clarified that this does not mean that any factual dispute will defeat the motion:

By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, (1986) (emphasis in original).

“A party opposing a properly supported motion for summary judgment ‘may not rest upon the mere allegations or denials of [his] pleadings,’ but rather must ‘set forth specific facts showing that there is a genuine issue for trial.’” *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 525 (4th Cir. 2003) (alteration in original) (quoting Fed.R.Civ.P. 56(e)). The court must “view the evidence in the light most favorable to ... the nonmovant, and draw all reasonable inferences in her favor without weighing the evidence or assessing the witness’ credibility,” *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 644-45 (4th Cir. 2002),

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<sup>2</sup>The agency notes, correctly, that Dr. Domek’s response to the motion for summary judgment does not contest the agency’s arguments on the issues of Dr. Domek’s disparate treatment and retaliation claims. As no opposition has been presented to the court, those portions of the motion will be granted, leaving only the failure to accommodate issue.

but the court also must abide by the “affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial.” *Bouchat*, 346 F.3d at 526 (internal quotation marks omitted) (quoting *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993), and citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)).

The Rehabilitation Act prohibits discrimination against a an otherwise qualified individual on the basis of a disability. Section 504 of the Act provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a) (2005). A “qualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” *Nanette v. Snow*, 343 F. Supp. 2d 465, 472 (D. Md. 2004) (quoting 42 U.S.C. § 12111(8)). Where, as here, the plaintiff makes a failure to accommodate claim, the plaintiff must establish “(1) that he was an individual who had a disability within the meaning of the statute; (2) that the [employer] had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position;” and “(4) that the employer refused to make such accommodations.” *Rhoads v. Fed. Deposit Ins. Corp.*, 257 F.3d 373, 387 n.11 (4th Cir.2001) (quoting *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999)).

Here, the agency claims that Dr. Domek was not “otherwise qualified” for the position of molecular biologist. To be considered “otherwise qualified,” Dr. Domek must show that he could perform the “essential functions” of his position. 29 C.F.R. § 1630.2(m). The “essential functions” include “functions that bear more than a marginal relationship to the job at issue.”

*Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) (quoting *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993); see also *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 279 (4th Cir. 2004). “A job function may be considered essential for any of several reasons, including . . . [that] the reason the position exists is to perform that function.” 29 C.F.R. § 1630.2 (n)(2). To determine whether a particular job function is essential, the court may look to the employer’s judgment as to which functions are essential, written job descriptions prepared before interviewing applicants for the job, and the work experience of past employees in the position or similar positions. *Id.* § 1630.2(n). The plaintiff “bears the burden of establishing his ability to perform the essential functions of his job with a reasonable accommodation.” *Fleetwood v. Harford Sys., Inc.*, 380 F. Supp. 2d 688, 697 (D. Md. 2005) (citing *Tyndall*, 31 F.3d at 213).

The Rehabilitation Act imposes on agencies a duty to provide “reasonable accommodations” to a disabled employee who could perform a job's essential functions with such accommodations, unless the provision of accommodations would place an “undue hardship” on the agency. 42 U.S.C. § 12112(b)(5)(A) (2000). “Reasonable accommodation” may include “[j]ob restructuring; part-time or modified work schedules; [or] reassignment to a vacant position.” 29 C.F.R. § 1630.2(o)(2)(ii).

Here, the agency asserts that Dr. Domek could not perform the essential functions of his job as a molecular biologist, which the agency claims include the ability to focus, concentrate, attend to important details, read documents of length and retain information. (Def’s Mot. Summ. J. 14.) The official description of Dr. Domek’s molecular biologist position, which was signed by Drs. Harrison and Greenstone, supports the agency’s contention that the ability to focus and



concentrate played a significant role in the job.<sup>3</sup> The introduction states that the Molecular Biologist “plans and conducts independent and cooperative research in support of long-term research objectives”; among the “Major Duties” listed are performing biochemical analyses, reviewing the scientific literature, participating in the preparation of data, performing experiments and maintaining official laboratory notebooks. (ROI 109-10.)

Dr. Domek has put forward no evidence that he could perform the essential functions of his position even with accommodation. Dr. John Parkhurst, a psychologist consulted by Dr. Domek, concluded that Dr. Domek “experiences cognitive slowing from his depression, which results in memory impairment, inability to focus, difficulty in concentration, and a failure to attend to important details.”<sup>4</sup> (ROI 210.) Moreover, Dr. Domek “is unable to read anything of any length and retain the information.” (*Id.*) His prognosis was described as “very guarded.” (ROI 212.) O.I. Jacykewycz, USDA’s Medical Officer, reviewed the medical records submitted by Dr. Domek and concluded that “there is no expected date for [Domek’s] recovery since his conditions are chronic.” (ROI 236.) Moreover, when asked if he could perform the essential functions of his position, Dr. Domek admits he could not perform “the more complex aspects

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<sup>3</sup>Dr. Domek claims that he was not told of the specific requirements of his position. (See ROI 52.) (“No requirements were ever expressed to me either verbally or in writing before I was accepted into the Molecular Biologist job.”) In the same interview, however, he was able to accurately recite the essential functions of the position, including “constructing specific modified genes excised from *Autographa Californica* genome.” (*Id.*) Dr. Domek was aware of the requirements as of February 2005, when he signed a copy of the performance standards for his job. (ROI 114.)

<sup>4</sup>Dr. Domek’s personal notes reflect a frustration at how his depression had affected his work, particularly his interactions with Dr. Harrison. In a journal entry for October 28th, he notes that “I asked a silly question of [Dr. Harrison], though I knew the answer.” A few days later, he writes “In my confusion and stressful state of mind, I asked a question that made me look very bad again.” (ROI 253.)

which required more extensive training.” (ROI 52.) There is no indication that any accommodation related to his disability would have allowed Dr. Domek to gain the “more extensive training” that he stated was necessary for him to perform his position.

Nor were the accommodations requested by Dr. Domek “reasonable.” Dr. Domek requested that he be put in a “light duty” position. It appears, given the cognitive limitations imposed upon Dr. Domek by his disability, that any “light duty” work would require that Dr. Domek be placed in a position that required at least some use of memory, focus, and concentration. The Rehabilitation Act does not require that an employer eliminate essential job functions in order to accommodate a disabled employee.<sup>5</sup> 29 C.F.R. Pt. 1630, App. at § 1630.2 (o) (“An employer or other covered entity is not required to reallocate essential functions.”); *see*

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<sup>5</sup>Even if the agency had been obliged to provide Dr. Domek with a “light duty position,” the record demonstrates that, owing to budget cuts at the Beltsville facility, there were no available positions at Dr. Domek’s grade which he would have been qualified to perform. (ROI 75, 238-44.) Dr. Domek counters, in a sworn affidavit, that there are several positions contained on the September 30th and October vacancy listings (ROI 238-40) in which he could have been placed. He identifies them as Bioscience Tech (7B697), Biolo. Sci Lab Techn (7B963), Biolog Sci Lab Tech (7B3286), Biolog. Sci Lab Tech (7B8506), Biolog Sci Lab Tech (7B1260), and Biolog. Sci Lab Tech 7B371. He claims that he was “sure he could have performed these jobs because [he has] an extensive background in plant sciences, analytical chemistry, biochemistry and plant pathology.” (Pl’s Opp’n Ex. 2 at ¶ 30.) Although reassignment to a lower graded position may qualify as a reasonable accommodation, 29 C.F.R. Pt. 1630, App. at § 1630.2 (o) (“An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation”), it is unclear how Dr. Domek’s fitness for these positions would not have been compromised by what the psychological report he submitted describes as his inability to “attend to important details,” or “read anything of length and retain the information,” and his “inability to focus [and] difficulty in concentration.” (ROI 210.)

Dr. Domek also identified an entomologist position (4B7875), for which he “would have applied . . . had [he] been informed about it.” (Pl’s Opp’n Ex. 2 at ¶ 30.) Dr. Collins testified that Dr. Domek did not have the requisite qualifications for the Category 4 position, (ROI 75), and an employer is not required to promote an individual with a disability as an accommodation. 29 C.F.R. Pt. 1630, App. at § 1630.2 (o).

also *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 687 (4th Cir. 1997) (concluding that an employer is not required to hire an additional employee to perform the essential functions of the disabled employee's job). Dr. Domek also requested that he be placed with a different supervisor, but it is unclear how Dr. Domek's disability would permit him to perform the exact same tasks under a different supervisor. Regardless, the Rehabilitation Act does not require that an employer transfer a disabled employee to a different supervisor as an accommodation. *Weiler v. Household Finance Corp.*, 101 F.3d 519, 526 (7th Cir. 1996).

Because Dr. Domek has not demonstrated that he could perform the essential functions of his position even with a reasonable accommodation, he is not an "otherwise qualified" individual entitled to the protections of the Rehabilitation Act. The agency's motion for summary judgment will be granted. A separate order follows.

May 29, 2008  
Date

/s/  
Catherine C. Blake  
United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

JOHN DOMEK,

v.

ED SCHAFER,

Secretary,

United States Department of Agriculture :

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Civil No. CCB-07-1469

**ORDER**

In accordance with the foregoing Memorandum, it is hereby ORDERED that:

1. Defendant Secretary Ed Schafer's Motion for Summary Judgment (docket no. 12) is **GRANTED**;
2. Judgment is entered in favor of the defendant; and
3. The Clerk shall **CLOSE** this case.

May 29, 2008  
Date

/s/  
Catherine C. Blake  
United States District Judge